Supreme Court, U.S.
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No. 06-582

IN THE

Supreme Court of the United States

THE UNIVERSITY OF NOTRE DAME,
Petitioner,

v.

JOAN LASKOWSKI, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE STATES OF INDIANA, ALABAMA, COLORADO, KANSAS, OHIO, SOUTH CAROLINA, TEXAS, WASHINGTON, and VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF THE PETITION

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QUESTIONS PRESENTED

1. Whether federal taxpayers have standing under *Flast v. Cohen*, 392 U.S. 83 (1968), to seek an injunction ordering a private religious university, which was not alleged to have committed a constitutional violation, to pay the Government, the alleged constitutional violator, an amount of money equal to an expired and fully expended government grant, where the past expenditure of that grant allegedly violated the Establishment Clause and the Government does not want the money.

2. Whether *Flast v. Cohen* should be overruled if the court of appeals' novel theory of taxpayer standing is consistent with that precedent.

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INTEREST OF *AMICI CURIAE*

As set forth in the brief of Indiana and 11 other states as *amici curiae* in support of the government's petition for certiorari in *Grace v. Freedom from Religion Found., Inc.*, No. 06-157, 75 U.S.L.W. 3065 (Aug. 1, 2006), state officials are frequently sued in federal court by state taxpayers seeking to enjoin ongoing government programs on Establishment Clause grounds. Under the rule established by the decision below, however, both states and the beneficiaries of state programs will now be vulnerable to lawsuits seeking not just injunctions against ongoing programs, but orders requiring financial reimbursement of the government fisc, even for programs that have ended. States have a compelling interest in Supreme Court review of this sweeping new Establishment Clause remedy—a remedy that threatens to undermine not only states' fiscal decisions, but also their sovereignty and their ability to effectuate social policies through state-funding programs.

REASONS FOR GRANTING THE PETITION

I. Review is Warranted Because the Decision Below Exposes State Treasuries and Social-Policy Initiatives to Federal-Court Supervision and Interference

1. Like the federal government, state governments regularly administer grant programs whereby religious institutions—along with wholly secular groups—receive taxpayer funds for purposes of carrying out secular functions. At least 33 states, including Indiana, have faith-based liaisons or a state office for faith-based and community initiatives. *See* White House Office of Faith-Based & Community Initiatives, *Contact Information—State Liaisons, available at* http://www.whitehouse.gov/government/fbci/contact-states.html (last visited Nov. 17, 2006). Indiana's Office of Faith-Based and Community Initiatives,

created to ensure that faith-based institutions are provided equal access to state and federal funding, provides training, technical assistance, and grants to community-based and faith-based organizations. *See* Office of Faith-Based & Community Initiatives, *About Us, available at* http://www.in.gov/ofbci/about/index.html (last visited Nov. 17, 2006).

States need not have an office dedicated to faith-based initiatives in order to administer grant programs that might have religiously affiliated beneficiaries. For example, in Indiana, the Family and Social Services Administration administers and distributes grants from the federal Child Care Development Fund, which, among other things, provides vouchers to eligible families for child-care expenses at approved providers, including those that are affiliated with a religion. *See* Ind. Code § 12-17.2-3.5 *et seq.*; *see also, e.g., DeStefano v. Emergency Hous. Group, Inc.*, 247 F.3d 397, 401 (2d Cir. 2001) (reviewing a challenge to government support for Alcoholics Anonymous, the national alcoholism-recovery program that incorporates Christian principles).

Many states also assist or accommodate religious institutions in other ways, such as through tax exemptions and tax deductions to donors. In Indiana, for example, the Neighborhood Assistance Program of the Indiana Housing and Community Development Agency provides over $2.5 million in tax credits to non-profits in Indiana to facilitate the provision of social services. In 2005, 67 Indiana non-profit organizations received tax credits, and at least 22 of those organizations were faith-based. *See* Office of Faith-Based & Community Initiatives, *Federal & State Resources for Faith-Based Institutions, available at* http://www.in.gov/ofbci/programs/faithbased/funding_opp.html (last visited Nov. 17, 2006); *see also, e.g., Johnson v. Econ. Dev. Corp.*, 241 F.3d 501, 503 (6th Cir. 2001) (reviewing the issuance of tax-exempt revenue bonds by a public-economic-development corporation on behalf of a Roman Catholic school).

These state programs are as vulnerable to the Seventh Circuit's dramatic expansion of Establishment Clause taxpayer standing as federal programs. In *Doremus v. Bd. of Educ.*, 342 U.S. 429, 434 (1952), the Court, presaging its decision in *Flast v. Cohen*, 392 U.S. 83, (1968), acknowledged that a state taxpayer can bring a "good-faith pocketbook action" where the government incurs at least a marginal cost owing to conduct that violates the Establishment Clause. Since *Flast*, courts have largely treated state-taxpayer standing to assert Establishment Clause violations the same as federal-taxpayer standing. *See Minn. Fed'n of Teachers v. Randall*, 891 F.2d 1354, 1357 (8th Cir. 1989) (observing that *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1 (1947), "indicated that establishment clause limits state spending powers as well" and "the effect of *Flast* was to harmonize in some respects federal and state taxpayer standing" after *Doremus*); *see also Women's Emergency Network v. Bush*, 323 F.3d 937, 943-45 (11th Cir. 2003); *DeStefano*, 247 F.3d at 405; *Korioth v. Brisco*, 523 F.2d 1271, 1276-77 n.16 (5th Cir. 1975) (all applying *Flast* to state- or local-taxpayer standing).

Accordingly, the restitution remedy suggested by the Seventh Circuit likely applies to states and their programs. For example, a state taxpayer might sue to force a religious secondary school to repay tuition for dual-enrolled students if the program has insufficient safeguards against sectarian education. *Cf. Minn. Fed'n of Teachers*, 891 F.2d at 1355 (challenging policy allowing public high school students to attend religiously affiliated colleges at public expense). Or, a state taxpayer might not only seek to enjoin allegedly unlawful legislative prayers, but also demand that those who gave unlawful prayers in the past cough up the state-paid cost of correspondence and photographs they received in connection with the occasion. *See Hinrichs v. Bosma*, 400 F. Supp. 2d 1103, 1105-06 (S.D. Ind. 2005). Indeed, as Notre Dame noted in its petition, *see* Pet. at 28, recoupment remedies for state-government Establishment Clause

violations are already springing forth. *See Ams. United for Separation of Church & State v. Prison Fellowship Ministries,* 432 F. Supp. 2d 862, 941 (S.D. Iowa 2006) (ordering a religious organization to repay to the State of Iowa the $1.5 million it received to provide prisoner-rehabilitation programs).

To be sure, most state programs that collaterally benefit religious institutions are, at least generally, fully consistent with current Establishment Clause doctrine. *See Zelman v. Simmons-Harris*, 536 U.S. 639, 643-44 (2002) (holding that a school-voucher program does not violate the Establishment Clause); *Mitchell v. Helms*, 530 U.S. 793, 801 (2000) (holding that a federal act distributing funds used for educational materials in private schools does not violate the Establishment Clause); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 3 (1993) (holding that the services of an interpreter to a disabled student attending a Catholic high school does not violate the Establishment Clause). That does not, however, foreclose the possibility that some state programs may be subjected to Establishment Clause challenges based on idiosyncratic flaws, such as a failure to provide adequate safeguards resulting in the use of a government grant for sectarian indoctrination. *See Mitchell*, 530 U.S. at 832; *Freedom from Religion Found., Inc., v. McCallum*, 179 F. Supp. 2d 950, 975-76 (W.D. Wis. 2002) (invalidating funding for a faith-based-treatment program that enabled governmental indoctrination of religion in violation of the Establishment Clause).

Given the nearly kaleidoscopic nature of Establishment Clause doctrine over the past few decades, there is no telling what the future may hold for these programs. *Cf. Mueller v. Allen*, 463 U.S. 388, 390-91 (1983) (permitting state income-tax credits for many parochial-school expenses); *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 794 (1973) (rejecting income-tax credits for parochial-school expenses); *Meek v. Pittenger*, 421 U.S. 349, 373 (1975)

(invalidating state-funded remedial help, speech therapy, hearing therapy, and counseling for private-school children); *Mitchell*, 530 U.S. at 808 (overruling *Meek*); *see also Agostini v. Felton*, 521 U.S. 203, 208-09 (1997) (overruling *Aguilar v. Felton*, 473 U.S. 402 (1985), which barred public-school teachers being sent to parochial schools to provide remedial education to disadvantaged children pursuant to a congressionally mandated program).

Due to the evolution of the doctrine, programs once assumed constitutionally sound might one day be adjudged to violate the Establishment Clause. Under the Seventh Circuit's standard, such programs could conceivably give rise to recoupment lawsuits against beneficiaries who long ago exhausted the government's largesse.

2. The implications for state sovereignty are ominous. Even if an elected state official decides against seeking recoupment of grants that allegedly violated the Establishment Clause, disgruntled taxpayers of any sort—potentially including transients whose only connection to a state is to have purchased items and paid state sales taxes—may use federal-court power to force reimbursement of the state treasury. This essentially casts electoral accountability aside and creates an army of private attorneys general who may review past state-government expenditures and then sue for recoupment of any that might have violated the Establishment Clause. Even more unsettling, taxpayer-plaintiffs and grant-recipient defendants could apparently negotiate their own settlements and determine how much of the allegedly unlawful grant, if any, should be returned to the state treasury.

As Judge Sykes observed in her dissent, the majority's decision vests "taxpayers with a unique sort of qui tam-like authority to sue private parties for reimbursement of the Treasury when the government is alleged to have committed an Establishment Clause violation." Pet. App. at 15 (Sykes,

J., dissenting). Yet this new, judicially created constitutional *qui tam* action lacks any of the procedural safeguards accompanying statutory *qui tam* actions, such as limits on the number of lawsuits seeking recovery for the same loss, and government authority to approve settlements. *Cf.* 31 U.S.C. § 3730.

Judicial supervision of a co-equal branch of the federal government is bad enough. But to apply that power to states offends well-established notions of comity and federalism. Management of fiscal resources is a core function of a sovereign government. *See Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 60 (1994) (O'Connor, J., dissenting) ("If a State were vulnerable at any time to retroactive damage awards in federal court, its ability to set its own agenda, to control its own internal machinery, and to plan for the future—all essential prerequisites of sovereignty—would be grievously impaired."). As co-sovereigns, states should not be subjected to loss-prevention directives of federal courts. *Cf. Heckler v. Chaney*, 470 U.S. 821, 831-33 (1985). Maintaining proper limits on state-taxpayer lawsuits is necessary to prevent federal courts from becoming state fiscal monitors. *See DaimlerChrysler Corp. v. Cuno*, __U.S.__, 126 S. Ct. 1854, 1864 (2006).

At the very least, such subversion of state/federal comity principles should not occur without intervention and full consideration by this Court. Review is warranted to ensure that federal courts remain within the limits of their proper judicial role when adjudicating Establishment Clause cases.

3. Churches and other faith-based organizations have become vital conduits to citizens for state social programs. *See, e.g.*, Ind. Code § 12-18-4 *et seq.* (implementing state domestic-violence policy through the Domestic Violence Prevention and Treatment Fund, a grant program for which religious organizations can qualify). The rule announced by the Seventh Circuit in this case, however, may deter

involvement by religious groups in the effectuation of state policy. Many faith-based groups already resist participation in government programs because of the administrative headaches involved and because they fear government directives affecting their mission work and other religious exercises. *See* Nadine Strossen, *Religion & the Constitution: A Libertarian Perspective*, 2006 Cato S. Ct. Rev. 7, 42 (2006). The added prospect that they might one day have to reimburse the state for grants that they receive under a program ultimately deemed unlawful—even if under an Establishment Clause standard that does not exist now but may exist years or even decades from now—may be too much risk for many of these groups to bear.

In this manner, the decision below threatens not only state-fiscal-management policies and abstract sovereignty interests, but also the effectuation of states' concrete social policies. Federal courts should not have the power to manage states in this manner—at least not without first having their expansive theories of taxpayer standing subjected to plenary review by the Court.

II. This Case and *Grace* Demonstrate the Need to Revisit Establishment Clause Taxpayer-Standing Doctrine

Over the past 35 years, the narrow rationale for allowing taxpayer standing in Establishment Clause cases, which was never very clear to begin with, has been lost amidst a general expansion of federal-court power. In many circumstances, lower federal courts have uncritically treated the invocation of taxpayer status in Establishment Clause cases as a mantra signaling entitlement to Article III standing. *See* Nancy C. Staudt, *Taxpayers in Court: A Systematic Study of a (Misunderstood) Standing Doctrine*, 52 Emory L. J. 771, 824 (2003) (observing that a taxpayer who brings an Establishment Clause claim has an 80% chance that he will be granted standing by a federal district court); *see also Hinrichs v. Bosma*, 440 F.3d 393, 396-97 (7th Cir. 2006)

(preliminarily approving state-taxpayer standing despite the lack of any marginal government expense supporting the allegedly unconstitutional features of legislative prayers).

The general result of this cavalier view toward state-taxpayer standing has been to disconnect adjudication of Establishment Clause disputes from the exercise of genuine Article III "judicial power." "[O]ver the course of the last two decades, the time when the federal courts allegedly closed their doors to taxpayers, at least three hundred taxpayer lawsuits have made their way into court." *See* Staudt, *supra,* at 773-74. Unsurprisingly, federal district courts have enabled this high number of lawsuits by granting state taxpayers standing outside the traditional limits of *Flast. See id.* at 819 (noting that federal district courts have granted taxpayers standing to bring under the Equal Protection and Due Process Clauses). Many courts do not even address standing when taxpayers are the plaintiffs. *See id.* at 814; *see also LSS Leasing Corp. v. United States Gen. Servs. Admin.*, 579 F. Supp. 1565, 1572 n.6 (S.D.N.Y. 1984); *Coal. to End Permanent Congress v. Runyon*, 796 F. Supp. 549, 558 n.8 (D. D.C.), *overruled* 971 F.2d 765 (D.C. Cir. 1992).

With its decisions in this case and in *Grace*, the Seventh Circuit has exposed the logical consequences of this constitutionally unsound trend. In *Grace*, the court blithely extended the set of government actions vulnerable to taxpayer Establishment Clause challenges to include executive-branch actions. *See Freedom from Religion Found., Inc. v. Chao,* 433 F.3d 989, 996 (7th Cir. 2006), *petition for cert. filed,* 75 U.S.L.W. 3065 (No. 06-157, Aug. 1, 2006). Here, the Seventh Circuit invented a new remedy utterly unconnected to the rationale for taxpayer standing in a strained effort to keep the case alive. *See* Pet. App. at 7-8. Permitting taxpayers to force grantees to disgorge unlawful receipts, particularly when the government eschews such recovery, has no connection to the historical concern for

enjoining unlawful spending itself. It is the act of taxing and spending, not the loss of the money, that causes the justiciable offense. *See Flast v. Cohen*, 392 U.S. 83, 102-03 (1968). Hence, recovering the money does not redress an Establishment Clause injury in the way that enjoining the act of spending does. *See DaimlerChrysler Corp. v. Cuno*, __U.S.__, 126 S. Ct. 1854, 1865 (2006) ("[A]n injunction against the spending would of course redress *that* injury . . . .").

This is a hazy distinction, so perhaps it was inevitable that courts would unfasten taxpayer standing from its animating principle. There is a natural tendency to view the injury as premised on the idea that government costs—expenditures and foregone tax revenues alike—injure taxpayers by increasing their tax burdens, however minutely. Yet the Court has rejected that view many times, from *Valley Forge*, where it held that the Establishment Clause does not limit the property disposition power, to last term's decision in *DaimlerChrysler*, where it rejected taxpayer standing in a Commerce Clause challenge to a tax-credit program. *See Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 468, 480 (1982); *Daimler-Chrysler*, 126 S. Ct. at 1865.

The bottom line is that the fuzzy logic permeating taxpayer-standing doctrine provides lower courts with insufficient guidance as to when recognizing taxpayer standing ceases to serve legitimate purposes. As a result, the Seventh Circuit justified its decision to expand Establishment Clause relief to include restitution to the constitutional *violator* because it believed that such relief is necessary to make taxpayers whole. *See* Pet. App. at 7-8. That may make sense if what counts is the loss of money owing to unlawful spending—but then so would taxpayer standing in Commerce Clause challenges. The rule makes no sense, however, if what counts is the *act* of taxing and then spending contrary to limits understood by the Framers.

Besides, the hypothetical ability of even a new resident to force a disfavored grantee to return unlawful grants from years ago demonstrates that being a taxpayer plaintiff is no longer about obtaining genuine relief so much as vindicating political viewpoints.

Across the nation, taxpayer Establishment Clause challenges to common government programs—even activities as seemingly innocuous as the Pledge of Allegiance—continue to mount. *See Elk Grove Unified Sch. Dist. v. Newdow,* 542 U.S. 1 (2004) (challenge to recitation of the Pledge of Allegiance in school); *Am. Jewish Congress v. Corp. for Nat'l Cmty. Serv.*, 399 F.3d 351 (D.C. Cir. 2005) (challenge to federally chartered corporation's AmeriCorps Education Awards Program, a nationwide community-service program); *Noresky v. Goord,* 120 Fed. Appx. 384 (2d Cir. 2005) (challenge to state department of corrections' use of prisoner work crews to perform renovation of church); *ACLU of Ohio Found., Inc. v. Ashbrook,* 375 F.3d 484 (6th Cir. 2004) (challenge to judge's courtroom display of Ten Commandments); *Hinrichs,* 400 F. Supp. 2d at 1105-06 (S.D. Ind. 2005) (challenge to Indiana's legislative prayer).

It is therefore necessary for the Court to consider whether taxpayer-standing doctrine maintains fidelity to Article III or instead has become an increasingly meandering detour from bedrock constitutional principles. At the very least, the Court needs to explain the doctrine of taxpayer standing in a way that permits consistent, principled application in future cases. If the Court does not untie the taxpayer-standing knot now, the doctrine will ultimately "interpose the federal courts as virtually continuing monitors of the wisdom and soundness of state fiscal administration, contrary to the more modest role Article III envisions for federal courts." *DaimlerChrysler*, 126 S. Ct. at 1864 (internal quotations omitted).

CONCLUSION

The petition for a writ of certiorari should be granted.

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